



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

Application of Golden Mast, Inc. (Hans
Weissgerber, Agent) for a Permit to Place Several
Structures with 35 Total Berths (27 or More
"After-the-Fact") on the Bed of Okauchee Lake,
Town of Oconomowoc, Waukesha County

Case Nos.: 3-SE-99-031

and

Investigation by Wisconsin Department of Natural
Resources Alleging Illegal Piers Are Being
Maintained on the Bed of Okauchee Lake, Town
of Oconomowoc, Waukesha County, by Golden
Mast, Inc.

3-SE-00-01031F

FINDINGS OF FACT, CONCLUSIONS OF LAW, PERMIT AND ORDER

In his capacity as agent for Golden Mast, Inc., Hans Weissgerber, Jr. applied to the Wisconsin Department of Natural Resources in early 1999 for an "after-the-fact" permit to maintain and expand several existing unpermitted piers on the Bed of Okauchee Lake, Town of Oconomowoc, Waukesha County, Section 35, Township 8 North, Range 17 East. According to the application, Golden Mast, Inc., had 27 existing berths (20 permanent, 7 for transient customer use) and proposed to increase the total number of berths to 35 (25 permanent, 10 for transient customer use).

On March 16, 2000, a notice was published which stated that unless written objection was received within 30 days the Department might make a decision on the application without a hearing. Several timely objections were received, several of which requested a public hearing.

The Department conducted a field investigation regarding the application and alleges that Golden Mast, Inc. has built new piers or extended existing ones onsite so the total number of berths now exceeds 27 and equals or exceeds the 35 for which a permit is sought. Based on their investigation, Department staff further allege that the existing piers and berthing density interfere with public rights in navigable waters because their number, size, and density are an unreasonable use of riparian right, have specific and cumulative adverse impacts on water quality, the fishery, wildlife, and natural scenic beauty, and cause the piers to occupy an unreasonably large lake area detrimentally impacting public rights.

Pursuant to due notice hearing was held on September 20, 2000, at Waukesha, Wisconsin, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding. The parties filed several post-hearing documents, the last of which was received on October 17, 2000.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Golden Mast, Inc., by

Hans Weissgerber, Jr.
P. O. Box 41
Okauchee, WI 53069

Wisconsin Department of Natural Resources, by

Attorney Edwina Kavanaugh
P. O. Box 7921
Madison, WI 53707-7921

FINDINGS OF FACT

1. Golden Mast, Inc., 1270 Lacy Lane, Okauchee, Wisconsin, 53069 (Golden Mast or the applicant), completed filing an application with the Department for a permit under sec. 30.12, Stats., to expand on the bed of Okauchee Lake, Waukesha County. The Department and the applicant have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats.

2. The applicant owns real property located in the Town of Oconomowoc in Section 35, Township 8 North, Range 717 East, Waukesha County. The above-described property abuts Okauchee Lake which is navigable in fact at the project site.

3. On October 12, 2000, the applicant advised the Division of Hearings and Appeals that he had withdrawn his request to expand the existing marina from 35 boat mooring slips.

4. Accordingly, case 3-SE-99-031 is moot as it related to the expansion proposal. However, because the application has complied with all procedural requirements of a sec. 30.12, Stats., structures permit, the Division retains jurisdiction to rule on said permit.

5. The DNR has never issued a sec. 30.12, Stats., structure permit for any piers placed at the site.

6. An Order was entered by the Waukesha County Circuit Court (the Circuit Court Order) on May 4, 1989, which "entitled" the applicant "to install a pier and docking structure in accordance with specifications which amended a previously issued Waukesha County Conditions Use Permit."

7. The Circuit Court Order authorized placement of twenty (20) permanent pier slips, as well as seven (7) transient mooring slips.

8. On June 4, 1996, the Waukesha County Park and Planning Commission approved a Conditional Use Permit which would authorize increasing overnight moorings from 20 to 25 slips and increasing short-term restaurant moorings from 7 to 10 slips (Ex. 19 NR). However, this was contingent upon Golden Mast obtaining a Department of Natural Resources “pier permit for existing and new piers prior to expanding” the number of piers at the site.

9. There are currently eleven (11) piers placed by Golden Mast at the site. (See Ex. 32) All eleven piers placed at the site extend beyond the line of navigation, the 3-foot depth contour, and thus require a 30.12 permit.

The applicant placed 9 piers, providing mooring for 27 boats, pursuant to the Circuit Court Order. The applicant subsequently purchased a neighboring, contiguous property, with 40 feet of riparian frontage. Over the past few years the prior owner had placed two piers seasonally. Golden Mast installed two suspension piers (#10 and #11 on Ex. 32 NR). One pier (#10) is 27 feet by 3 inches long and 7 feet 6 inches wide, the other is 29 feet by 9 inches and 8 feet wide.

It is appropriate to consider the site as a whole, because the piers are maintained by a common owner on contiguous properties.

10. The Golden Mast piers provide significant public access to Okauchee Lake. Numerous persons testified that they benefited from the public access provided by the Golden Mast piers. (McInerry, Scully, et al). Further, there is no question that Golden Mast has improved existing piers and maintained the marina in an efficient and attractive manner. (Ibid.) The DNR concedes that Golden Mast does so operate the marina, and that the marina does offer public access to the Lake. However, the Department is concerned that the same people rent the same slips year after year, because the roster of renters is not rotated more often.

11. The Golden Mast piers constitute “a marina or other similar mooring facility” within the meaning of sec. NR 326.04(8), Wis. Adm. Code. Accordingly, a pier permit is required. Further, it is appropriate to require that piers be rented on a first-come, first-served basis.

12. Okauchee Lake has a good fishery, including large mouth bass, musky, northern and walleye pike and panfish. The near shore is highly developed, which limits the area available for spawning and nursery habitat for game fish. The existing piers do not have a detrimental impact upon maintenance of fishery values. (Wakeman)

13. DNR Water Resource Specialist Robert Wakeman testified that 27 slips is the maximum number which would be compatible with the aquatic environment. The site has been adversely impacted by the existing pier structures. The exotic nuisance species, Eurasian water milfoil (EWM), has established itself and dominated near-shore areas. This is true at the site, as well on much of Okauchee Lake (Ex. 33 NR). Because EWM gets to the surface of the water and sunlight faster, it shades out native plants. Wakeman testified that piers contribute to this process, because both piers and boats further shade out native aquatic plants and contribute to EWM dominance. However, Wakeman testified that there was no significant difference between individual piers which required that the two new suspension piers (#10 and 11) be the ones that are removed. Golden Mast notes that, in building the suspension piers, it was trying to reduce environmental impacts. The applicant also incurred significant expense in installing the suspension piers. Accordingly, the permit gives the applicant discretion to remove any pier that will reduce moorings by two boats.

14. The applicant is financially capable of constructing, maintaining, monitoring or removing the structures if it should be found in the public interest to do so.

15. The existing structures will not reduce the effective flood flow capacity of Okauchee Lake upon compliance with the conditions in the permit.

16. The existing structures will not adversely affect water quality nor will it increase water pollution in Okauchee Lake. The structure will not cause environmental pollution as defined in sec. 218.01(10), Stats., if the structures are built and maintained in accordance with this permit.

17. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

DISCUSSION

Golden Mast places piers well in excess of the DNR "reasonable use" threshold. However, this reflects the fact that the Golden Mast piers provide significant public access to Okauchee Lake. Further, given historic use of the site for this purpose, and the prior Circuit Court decision, permitting some number above the reasonable use threshold is appropriate.

There are currently 11 piers, capable of mooring 31 boats, at the project site. The DNR is seeking an Order to eliminate 2 piers and to limit the total number of boats moored to 27. Golden Mast argues that it has incurred considerable expense in placing the two new suspension piers. However, it installed them without a permit. There is no doubt that they are structures placed below the OHWM, and thus require a permit. (Ex. 38-B NR).

The Order and Permit issued below require that one pier and two boat mooring slips be removed. There was no significant environmental difference as to which pier be removed. (Wakeman) Accordingly, Golden Mast is allowed discretion to choose which pier it removes.

The permit represents a compromise between the 31 slips and 11 piers now sought by the applicant, and the 27 slips and 9 piers by the Department. It is written with the assumption that Golden Mast will make every effort to rotate its slip-roster to include more members of the public. While any reduction in boating density will be slight, there will be an end to the ever-increasing numbers of boats and slips at the site. The applicant is to be commended for withdrawing his request to expand further.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue a permit for the construction and maintenance of said structure subject to the conditions specified.

2. The piers described in the Findings of Fact constitute structures within the meaning of sec. 30.12, Stats.

3. The applicant is a riparian owner within the meaning of sec. 30.12, Stats.

4. If the Department learns of a possible violation of the statutes relating to navigable waters or a possible infringement of the public rights relating to navigable waters, and the Department determines that the public interest may not be adequately served by imposition of a penalty or forfeiture, the Department may proceed as provided in sec. 30.03, Stats., either in lieu of or in addition to any other relief provided by law. The Department may order a hearing under Ch. 227 concerning the possible violation or infringement, and may request the ALJ to issue an order directing the responsible parties to perform or refrain from performing acts in order to fully protect the interests of the public in the navigable waters. Section 30.03(4)(a), Stats. The piers will not violate public rights if they are placed and maintained in accordance with the permit conditions set forth below.

5. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicant, a permit under sec. 30.12, Stats., for the construction of the structures as described in the foregoing Findings of Fact, subject, however, to the conditions that:

1. The authority herein granted can be amended or rescinded if the structures become a material obstruction to navigation or becomes detrimental to the public interest.
2. The permittee shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employee of the Department of Natural Resources for the purpose of investigating the construction, operation and maintenance of the project.
3. The permit granted herein shall expire three years from the date of this decision, if the structures are not completed before then.
4. The permittee shall obtain necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.
5. Your acceptance of this permit and efforts to begin work on this project signify that you have read, understood and agreed to follow all conditions of this permit.
6. You must charge no more than a reasonable fee for the slip (or mooring) rentals. Reasonable fees are moorage fees charged the general public at similar facilities in the vicinity.
7. You must maintain a first-come, first-served waiting list and advise those individuals on the list of any available slips. This waiting list must be made available to Department personnel upon request.
8. You must initially notify the public of the availability of slips by advertising in the Oconomowoc Enterprise for a period of not less than seven days. Thereafter, you must seasonally advertise the availability of slips in the same paper whenever the waiting list is depleted.
9. All portions of the pier used for public slips must also be available to the public for use (possible uses might be a promenade or for fishing) during all daylight hours.
10. The Department reserves the right to further restrict, condition, modify, or revoke this permit if it finds that the pier is not being adequately offered for use to the public.
11. No mooring buoys are authorized by this permit or allowed without modification of this permit.
12. You must provide adequate upland access, including parking, for the general public consistent with the number of slips offered for rental to the general public.
13. Of the 29 (twenty-nine) mooring/slips allowed at this site 22 (twenty-two) must be dedicated for public rental. The seven remaining slips may be used for restaurant patrons or transient boaters. No more than 10 piers (including the suspension piers) shall be placed at the site.

ORDER

WHEREFORE IT IS HEREBY ORDERED, that the applicant be granted a permit as described above.

Dated at Madison, Wisconsin on November 20, 2000.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By _____
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.